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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

STATE OF MONTANA,)

Plaintiff and Counterclaim Defendant) **NO. CV-83-317-HLN-PGH**

vs.) **MEMORANDUM AND ORDER**

ATLANTIC RICHFIELD COMPANY,)

Defendant and Counterclaimant.)

In the present action, the State of Montana ("the State") seeks to recover monetary damages from Atlantic Richfield Company ("ARCO"), for injuries to natural resources in the Upper Clark Fork River Basin[1] allegedly caused by the generation and release of hazardous

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1. The Clark Fork River Basin has its headwaters near Butte, Montana, and flows to the Idaho border. The natural resources allegedly injured are located from the headwaters of the Clark Fork River to the Milltown Reservoir near Missoula, Montana.

Exhibit F

substances by ARCO and its predecessors-in-interest.[2] The claims advanced by the State are premised upon the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601, et. seq., ("CERCLA"); and the Montana Comprehensive Environmental Cleanup and Responsibility Act ("CECRA"), Mont. Code. Ann. §§ 75-10-701, et. seq.[3] The State invokes this court's federal question jurisdiction, pursuant to 28 U.S.C. § 1331, together with its supplemental jurisdiction under 28 U.S.C. § 1367.

In anticipation of the present action, the State undertook to conduct a natural resource damage ("NRD") assessment pursuant to NRD regulations issued by the Department of Interior ("DOI").[4] See, 43 C.F.R. § 11.10 et. seq. The purpose of the NRD assessment was to determine and quantify the natural resources injuries for which ARCO is responsible, and establish the proper amount of monetary damages owing to the State under CERCLA and

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2. The State alleges ARCO and its predecessors-in-interest, e.g., the Anaconda Copper Mining Company and Amalgamated Copper Mining Company, have, since 1860, released hazardous substances into the Clark Fork River Basin at four distinct Superfund sites: the Silver Bow Creek / Butte Addition, the Anaconda Smelter, the Milltown Reservoir and the Montana Pole site.

   The hazardous substances allegedly released into the environment at these sites include arsenic, cadmium, copper, lead, mercury, zinc, creosote and pentachlorophenol.

3. Section 107 of CERCLA authorizes State officials, acting as public trustees, to institute actions against responsible parties to recover damages for harm to natural resources caused by the release of hazardous substances. See, 42 U.S.C. § 9601(f)(1).

   CECRA, which is modeled after CERCLA, contains a similar provision at Mont. Code Ann. § 75-10-715(4).

4. The DOI is the federal agency responsible for promulgating natural resource damage assessment regulations. See, 42 U.S.C. § 9651(c)(1).

   Whether the State's NRD assessment was conducted in accordance DOI regulations is the subject of a dispute between the parties. For purposes of this Memorandum and Order, the court shall assume the NRD assessment was conducted pursuant to DOI regulations.

CECRA. Upon completion of the NRD assessment, the State, in accordance with 43 C.F.R. § 11.91(c), compiled an "administrative record" documenting its assessment. The administrative record purportedly consists of, inter alia,: 1) all of the State's assessment documents (including public comments and the State's responses thereto); 2) a Restoration Determination Plan; 3) reports prepared by ARCO's experts; 4) reports prepared by the State's experts; and 5) various documents generated by the Environmental Protection Agency ("EPA") during its investigation of appropriate response alternatives (i.e., clean-up alternatives) for the Superfund sites under scrutiny in the present action.[5]

Presently before the court is the State's motion requesting the court to determine and quantify the natural resource damages recoverable in this case, based solely upon a review of the State's "administrative record", under an arbitrary and capricious standard. Having reviewed the record herein, together with the parties' briefs in support of their respective positions, the court is prepared to rule.

BACKGROUND

The federal Superfund statute, more formally known as CERCLA, Pub.L. No. 96-510, 94 Stat. 2767 (1980)(amended by the Superfund Amendments and the Reauthorization Act of 1986, Pub.L. No. 99-499, 100 Stat. 1613) ("SARA"), makes specified classes of parties -- including past and present owners and operators of hazardous waste sites, transporters of

5. This action is a companion case to another CERCLA action presently before this court denominated United States v. Atlantic Richfield Co., Cause No. CV-89-039-BU-PGH. In United States v. Atlantic Richfield Co., the United States, through the EPA, seeks to recover responses costs associated with the remediation of the Superfund sites described above.

hazardous substances, waste generators, and others who arrange for the disposal, treatment, or transport of hazardous substances -- potentially liable for the expenses the federal and state governments, as well as Indian tribes, incur in cleaning up hazardous substances released into the environment. See, 42 U.S.C. § 9607(a)(1)-(4)(A).[6]

In addition, and at the heart of this case, responsible parties are financially liable for "injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss . . ." caused by the release of hazardous substances. See, 42 U.S.C. § 9607(a)(4)(C).[7] Before commencing an action to recover natural resource damages, a trustee may attempt to determine the recoverable damages pursuant to an administrative assessment process promulgated under § 301 of CERCLA, 42 U.S.C. § 9651(c). The administrative assessment process consists of a four-stage procedure, which includes an opportunity for public review and comment.

In the first stage, a trustee conducts a "preassessment screen" wherein information is reviewed to determine whether there exists a reasonable probability a claim will be successful, thus justifying the expense and effort of conducting a full assessment. See, 43 C.F.R. §§ 11.23-25. If an assessment is to be performed, a "Notice of Intent to Perform an Assessment" is sent to potential responsible parties, inviting their participation in the development of the assessment.

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6. The response costs recoverable under CERCLA include: 1) expenses incurred in removing the hazardous substance; 2) expenses incurred in destroying or recycling the hazardous substance; and 3) expenses incurred in establishing a protective perimeter around the hazardous substance. See, 42 U.S.C. § 9601(23)-(24).

7. The term "natural resources" is defined in § 101 of CERCLA to include all "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States[,] . . . any State or local government, any foreign government, [or] any Indian tribe. . . ." See, 42 U.S.C. § 9601(16).

See, 43 C.F.R. § 11.32(a)(2)(iii)(A).

In the second stage, the trustee develops an "assessment plan," which describes in some detail how the trustee expects to determine the monetary value of the injury suffered by the natural resources, including a statement whether the trustee intends to conduct a Type A or Type B assessment.[8] See, 43 C.F.R. §§ 11.30-11.35.

During the third stage, the trustee conducts the assessment, which in the case of a Type B assessment involves three phases: an "injury determination phase," wherein the trustee ascertains whether the release of a hazardous substance has, in fact, caused injury to natural resources, See, 43 C.F.R. §§ 11.60-11.64;[9] a "quantification phase," wherein the trustee determines the extent of the physical injury, as compared to the baseline conditions that would have existed if the hazardous substances had not been released into the environment, See, 43 C.F.R. §§ 11.70-11.73; and the crucial "damage determination" phase, wherein the trustee determines, pursuant to a Restoration and Compensation Determination Plan ("RCDP"), the amount of money it will seek as compensation for natural resource injuries.[10] See, 43 C.F.R.

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8. The Type A assessment contains standard methodologies for assessing natural resource damages in less complex cases requiring only minimal field observation. See, 43 C.F.R. § 11.40.

   The Type B assessment, which was utilized by the State in the present case, provides alternate methodologies for assessing natural resource damages in complex cases demanding more detailed evaluations. See, 43 C.F.R. § 11.60.

9. In the "injury determination" phase, the trustee determines which resources were injured and identifies an exposure pathway linking the release of a hazardous substance to a damaged resource. See, 43 C.F.R. § 11.63.

10. A natural resource damage claim has three prongs: (1) a claim for the monies required to restore, rehabilitate, replace or acquire an equivalent of the injured natural resource; (2) a claim for the lost "compensable value" of the resource; and (3) a claim for the costs incurred in assessing and enforcing the natural resource damage claim. See, 43 C.F.R.

§§ 11.80-11.84. Having conducted the assessment, the trustee proceeds to the fourth stage, the "post-assessment" phase, during which the trustee prepares a report describing the assessment, and presents a demand to potentially responsible parties for their share of the damages. See, 43 C.F.R. §§ 11.90-11.91.

The assessment procedures described above for determining natural resource damages are not mandatory. See, 43 C.F.R. § 11.10. However, if a trustee determines the amount of natural resource damages in accordance with the DOI regulations, the trustee's assessment enjoys a rebuttable presumption of validity in subsequent judicial proceedings. See, 42 U.S.C. § 9607(f)(2)(C).

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§ 11.80(b).

Under the first prong, the trustee seeks to recover the monies required to restore the injured natural resource to its baseline conditions; the physical, chemical, and biological conditions the injured natural resource would have exhibited today, had the discharge of hazardous substance not occurred. See, 43 C.F.R. §§ 11.80-11.82.

Under the "compensable value" prong, the trustee seeks to recover: (1) the amount of money required to compensate the public for the loss in services provided by the resource, from the time of the release to the time the resource is returned to its baseline conditions; and (2) the lost "nonuse values" of the resource also known as the existence and bequest values. See, 43 C.F.R. § 11.83(c).

To prepare the RCDP, the trustee develops a reasonable number of alternatives for restoration or replacement of the injured natural resource; selects the most appropriate alternatives; and identifies the valuation methodologies to be used to compute natural resource damages. See, 43 C.F.R. §§ 11.80-11.82. The selection of the appropriate restoration and replacement alternatives is premised upon a number of factors listed in the DOI regulations which include: technical feasibility; cost effectiveness; compatibility with the planned response actions; and consistency with relevant federal, state and tribal policies. See, 43 C.F.R. § 11.82(d). In addition, if the trustee wishes to recover the compensable value of the lost resources pending restoration, the RCDP must develop procedures for measuring the lost use and non-use values of the resources. See, 43 C.F.R. § 11.81(a)(1).

The State commenced its NRD assessment activities in 1991 with the issuance of a preassessment screen. Based upon the findings in the preassessment screen, the State issued a "Notice of Intent to Perform Assessment" pursuant to 43 C.F.R. § 11.32(a)(2)(iii)(A). The notice invited ARCO to participate in the development of the NRD assessment.

On January 17, 1992, the State issued Part I of its NRD assessment plan. Part I of the plan identified the methodologies for conducting injury determination and quantification for surface water, fisheries, sediments and groundwater resources. On April 24, 1992, the State issued Part II of its assessment plan, which identified the methodologies for conducting injury determination and quantification for air, soil, vegetation and wildlife resources, and the methodologies for determining damages. On June 8, 1994, the State issued Part III of its assessment plan, which set forth the methodologies for conducting additional natural resource damage assessments relating to aquatic resources. All three parts of the assessment plan were made available for review and comment by ARCO and other interested parties.

In January, 1995, the State issued a Report of Assessment, delineating the alleged injuries to various natural resources, and a Restoration Determination Plan describing the State's proposed selection of restoration actions for the Upper Clark Fork River Basin. The State sought and received comments on the Restoration Determination Plan.

Following the close of discovery, the State submitted the present motion, which requests the court to ascertain whether the amount of natural resource damages recoverable under CERCLA and CECRA are properly determined by reviewing the State's administrative record, under an arbitrary and capricious standard, or by conducting a de novo review of a factual

record created at trial from evidence introduced by the parties.[11] The State contends that once a trustee conducts a natural resource damage assessment in accordance with the applicable DOI regulations, an administrative record review is the appropriate method to determine natural resource damages. ARCO, of course, vehemently disagrees, asserting the court must make a de novo determination of the recoverable natural resource damages, similar to any other tort action where a plaintiff seeks monetary relief for alleged injury to real property.

DISCUSSION

A. JUDICIAL REVIEW OF A NATURAL RESOURCE DAMAGE CLAIM UNDER CECRA

The State maintains that a claim for natural resource damages under CECRA should be reviewed on the administrative record, because the second sentence in § 722(4) of CECRA, Mont. Code Ann. § 75-10-722(4), explicitly provides for a record review in a natural resource damage case.[12]

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11. Under an administrative record review, the court would review the administrative record created by the State under the traditional administrative model embodied in the Administrative Procedure Act, 5 U.S.C. §§ 701-706, giving substantial deference to the State's selection of appropriate restoration alternatives and determination of recoverable damages.

    ARCO could challenge the State's selection of restoration alternatives and determination of damages based only on the information compiled in the administrative record. The State's determination of damages would be set aside only if it was found to be arbitrary and capricious.

12. The full text of Mont. Code Ann. § 75-10-722 is set forth below.

    75-10-722. Payment of state costs and penalties.

    (1) The department shall keep a record of the State's remedial action costs.

The second sentence in subsection (4) of Mont. Code Ann. § 75-10-722, states that "[t]he court may disallow costs or damages only if the person liable under 75-10-715 can show on the record that the costs are not reasonable and are not consistent with this part."[13] In the opinion of the State, the use of the terms "costs" and "damages", in the disjunctive, clearly evidences that § 75-10-722(4) contemplates an administrative record review in both a natural resource damage case and a suit for remedial action costs. ARCO, on the other hand, argues that Mont. Code Ann. § 75-10-722(4) contemplates a record review only in an action to recover remedial action costs.

Because there exists no decision by the Montana Supreme Court addressing the proper

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(2) Based on this record, the department may require a person liable under 75-10-715 to pay the amount of the state's remedial action costs and, if applicable, penalties under 75-10-715(3).

(3) If the state's remedial action costs and penalties are not paid by the liable person to the department within 60 days after receipt of notice that the costs and penalties are due, the department shall bring an action in the name of the state to recover the amount owed plus reasonable legal expenses.

(4) An action to recover remedial action costs may be brought under this section at any time after any remedial action costs have been incurred, and the court may enter a declaratory judgment on liability for remedial action costs that is binding on any subsequent action or actions to recover further remedial action costs. The court may disallow costs or damages only if the person liable under 75-10-715 can show on the record that the costs are not reasonable and are not consistent with this part.

(5) An initial action brought under 75-10-715(4) or a contribution action for costs incurred under this part must be commenced within 6 years after initiation of physical onsite construction of the final permanent remedy.

(6) Remedial action costs and any penalties recovered by the state under 75-10-715 must be deposited into the environmental quality protection fund established in 75-10-704.

13. Mont. Code Ann. § 75-10-715(4) authorizes the State to initiate actions "to recover remedial action costs, natural resource damages or penalties . . . ."

interpretation to be afforded § 722(4) of CECRA, this court must predict how the Montana Supreme Court would rule if presented with this issue of law.[14] When called upon to construe a statute, the court is to ascertain and declare what is in terms and substance contained in the statute, and not to insert what has been omitted or omit what has been inserted. Great Northern Utilities Co. v. Public Service Commission, 293 P. 294 (Mont. 1930); Vaughn & Ragsdale Co. v. State Board of Equalization, 96 P.2d 420 (Mont. 1939). The court is not to "second-guess and substitute its judgment for that of the legislature." Harmon v. Phillips Petroleum Co., 555 F.Supp. 447, 452 (D.Mont. 1982).

To ascertain legislative intent, the courts must first look to the language employed, and the apparent purpose to be subserved by the statute. See, State v. Austin, 704 P.2d 55 (Mont. 1985). The legislative intent is to be ascertained, in the first instance, from the plain meaning of the words used. Boegli v. Glacier Mountain Cheese Co., 777 P.2d 1303 (Mont. 1989). If the intent of the legislature can be determined from the plain meaning of the words used in the statute, the plain meaning is controlling and the court need not go further and apply any other means of interpretation. Phelps v. Hillhaven Corp., 752 P.2d 737 (Mont. 1988); Missoula County v. American Asphalt, Inc., 701 P.2d 990 (Mont. 1985). If the intent of the legislature cannot be determined from the plain meaning of the words used in the statute, the court may resort to the other rules of statutory construction to assist it in determining legislative intent.

Applying the pertinent rules of construction in the instant case, the court concludes that

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14. When presented with an issue of substantive state law as to which there has not been a definitive ruling by the Montana Supreme Court, this court, guided by all available sources of Montana Law, must undertake to predict how the Montana Supreme Court would rule if confronted with the issue of law. See, Meredith v. Winter Haven, 320 U.S. 228 (1943); Molsbergen v. United States, 757 F.2d 1016, 1020 (9th Cir. 1985).

ARCO's interpretation of § 722(4) is proper. Section 75-10-722(4) was designed to prescribe the appropriate method for reviewing a claim for the reimbursement of "remedial action costs," when such costs are properly documented by the State in accordance with Mont. Code Ann. § 75-10-722(1). Notwithstanding the legislature's unexplained use of the phrase "costs or damages" in § 75-10-722(4), a reading of the entire statute reveals that the statute does not apply to claims for natural resource damages.

The statute is entitled "Payment of state costs and penalties." Subsection (1) of § 722 requires the State to compile a record of "remedial action costs." Subsection (2) permits the State to require a liable person to pay "remedial action costs and . . . penalties" properly documented by the State. Subsection (3) requires the State to bring an action to recover the amount owed "if the state's remedial action costs and penalties are not paid" within 60 days after a payment demand is made upon the liable person. The first sentence in subsection (4) provides that "an action to recover remedial action costs may be brought . . . any time after any remedial action costs have been incurred . . ." The second sentence in subsection (4), upon which the State predicates its position, must, under fundamental tenets of statutory construction, be read in conjunction with the first sentence of subsection (4). Accordingly, when the phrase "costs or damages" is used in the second sentence, it is in reference to the type of action described in the first sentence, i.e., an "an action to recover remedial action costs." Mont. Code Ann. § 75-10-722(4).

The foregoing construction of § 722(4) is further supported by the prescriptions of Mont. Code Ann. § 75-10-715(4). As previously discussed, § 715(4) is the statutory provision authorizing the State to initiate actions "to recover remedial action costs, natural resource

damages or penalties . . ." Section 715(4) states that judicial proceedings to recover remedial action "costs and penalties" are to be conducted via the record review prescribed in Mont. Code Ann. 75-10-722. Noticeably absent from § 715(4) is a similar directive with respect to claims for natural resource damages. Logic dictates that if the Montana Legislature intended natural resource damage claims to be judicially reviewed on the record, pursuant to the prescriptions of Mont. Code Ann. § 75-10-722, it would have inserted the appropriate language in § 75-10-715(4). Accordingly, it is the opinion of this court that § 722(4) of CECRA does not contemplate an administrative record review in a natural resource damage case.

B. JUDICIAL REVIEW OF A NATURAL RESOURCE DAMAGE CLAIM UNDER CERCLA

At the outset, the court notes that CERCLA does not expressly prescribe the proper method of judicial review to be used in a natural resource damage case, where the trustee purports to quantify natural resource damages in accordance with applicable DOI regulations. Moreover, the issue has not been directly addressed by any court.

The State advances five arguments in support of its position that a claim for natural resource damages under CERCLA should be determined upon a record review. First, the rationale that compelled courts to conduct a record review of the remedial alternatives selected by the EPA in pre-SARA response cost action, also compels a record review in a natural resource damage case.[15] Second, the State's NRD assessment constitutes action by an

15. Prior to SARA, courts generally reviewed the EPA's selection of remedia alternatives on the administrative record, under an arbitrary and capricious standard, because the

administrative agency, and "agency action" is routinely reviewed by a court on the administrative record under an arbitrary and capricious standard. Third, the DOI has implied, through its regulations, that the amount of natural resource damages recoverable under CERCLA should be determined on the administrative record. Fourth, the National Oceanic and Atmospheric Administration ("NOAA"), the administrative agency which promulgates regulations implementing the natural resource damage provisions of the Oil Pollution Act ("OPA"), 33 U.S.C. § 2701 et seq., has stated that recoverable natural resource damages under the OPA, a statute modeled after CERCLA, are to be determined under a judicial review of the NOAA's administrative record. Fifth, judicial review of a natural resource damage claim on the administrative record would effectuate critical policies underlying CERCLA.

In response, ARCO challenges the arguments advanced by the State, and further asserts that a de novo determination of natural resource damages is appropriate for several reasons. First, the right to a jury trial in a natural resource damage action, a right generally recognized by federal courts, supports a conclusion that recoverable natural resource damages are to be

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selection of appropriate remedial alternatives required specialized knowledge and expertise, and was therefore entitled to substantial deference by the court. See, e.g, United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726, 748 (8th Cir. 1986).

As part of SARA, Congress added § 113(j) to CERCLA, which expressly provides that judicial review of selected remedial alternatives is limited to the agency's administrative record. The court must uphold the selected remedial alternatives "unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law." 42 U.S.C. § 9613(j)(2).

The State argues that its NRD assessment should be reviewed on the record because the selection of appropriate restoration alternatives, and the determination of natural resource damages requires specialized knowledge and expertise.

determined de novo. Second, the "rebuttable presumption" afforded a NRD assessment conducted in accordance with DOI regulations, is wholly inconsistent with a damage determination under an administrative record review. Third, the fact CERCLA explicitly provides for a record review of remedial alternatives selected in a response cost action, necessarily infers that if Congress had intended natural resource damages to be determined via a record review, it would have specifically provided for such a review in CERCLA. Fourth, a determination of recoverable natural resource damages under a record review would deny ARCO its fundamental right to due process.[16]

Having carefully considered the matter, this court deems it appropriate to review the State's natural resource damage claims de novo for two reasons. First, CERCLA's statutory scheme supports a de novo determination of damages. Second, it is the opinion of this court that a defendant has a constitutional right to a jury trial in a natural resource damage action, and a record review, under an arbitrary and capricious standard, interferes with that right.[17]

1) CERCLA'S STATUTORY SCHEME

Congress indicated its choice of a de novo review for natural resource damage claims (1) by including a "rebuttable presumption" provision in § 107(f)(2)(C) of CERCLA; and (2) by amending CERCLA's response cost provisions, in 1986, to specifically provide for a record review, while failing to make a similar amendment with respect to CERCLA's natural resource

16. ARCO also contends the State's motion for a record review should be denied because the motion is untimely. Because the court determines the motion fails on its merits, the court does not find it necessary to address the timeliness of the motion.

17. The fact ARCO has not demanded a jury trial in this case, pursuant to F.R.Civ.P. 38, does not alter the standard of judicial review applicable to this natural resource damage action.

damage provisions.

Section 107(f)(2)(C) of CERCLA states that a NRD assessment, conducted in accordance with DOI regulations, shall be afforded a rebuttable presumption of validity in subsequent judicial proceedings. See, 42 U.S.C. § 9607(f)(2)(C). The rebuttable presumption provision cannot be reconciled with a record review, because a rebuttable presumption and a record review are premised upon divergent rules of evidence.

Under a record review, the party challenging the administrative decision must demonstrate the agency's decision is insupportable on the record. See, Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 619-20 (1966); Villa View Community Hospital, Inc. v. Heckler, 720 F.2d 1086, 1090 (9th Cir. 1983). Accordingly, the burden of proof is allocated to the party challenging the decision of the administrative agency. In contrast, a rebuttable presumption does not alter the burden of proof, which always remains with the plaintiff. See, F.R.Evid. 301;[18] St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-08 (1993). The rebuttable presumption, which carries sufficient weight to constitute a prima facia case, merely operates to shift the burden of production to the opposing party to rebut the presumption, by

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18. Fed.R.Evid. 301 provides as follows:

Rule 301. Presumptions in General Civil Actions and Proceedings.

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

offering evidence which would support a finding that the presumed fact does not exist. 509 U.S. at 506-09. Once the presumption is rebutted, the presumption disappears from the case. Id. Accordingly, the rebuttable presumption provision in CERCLA contemplates that the burden of proof in a natural resource damage action shall always remain with the plaintiff.

The rebuttable presumption provision in CERCLA is also incompatible with a record review because the record review would operate to make the rebuttable presumption superfluous. If a record review were utilized in a natural resource damage case, the court would automatically presume the validity of the NRD assessment. The rebuttable presumption, which has a much weaker evidentiary effect, would be stripped of its substantive impact on the case.[19] The tenets of statutory construction preclude this court from construing CERCLA in a manner that would make CERCLA's rebuttable presumption provision meaningless. See, United States v. Colacurcio, 84 F.3d 326, 332 (9th Cir. 1996); United States v. Powell, 6 F.3d 611, 614 (9th Cir. 1993) (a statute should not be construed in a manner that makes provisions in the statute meaningless).

The second way Congress indicated its selection of a de novo trial in a natural resource damage action, relates to its amendment of CERCLA in 1986. As originally enacted, CERCLA did not limit judicial review of any agency action to an administrative record. However, with the addition of § 113(j) in 1986, Congress expressly stated that the review of remediation alternatives selected in a response cost action, shall be limited to a record review. See, 42

19. A "rebuttable presumption" would have no significance under a record review where, at the outset, the burden of proof is shifted to the defendant to prove the trustee's damage determination is arbitrary and capricious.

U.S.C. § 9613(j)(2).[20] Congress' specific mandate for deferential review of remediation alternatives based on the administrative record, combined with its continued silence regarding the review of natural resource damage claims, demonstrates a congressional intent to provide for a record review solely with respect to response cost actions. Under established principles of statutory construction, it must be presumed that Congress acts purposefully when it includes particular language in one section of a statute, but omits similar language from another section of the same statute. See, West Coast Truck Lines, Inc. v. Arcata Community Recycling Ctr., Inc., 846 F.2d 1239, 1244 (9th Cir. 1988); United States v. Heuer, 749 F.Supp 1541, 1542 (D.Mont. 1989).

2) CONSTITUTIONAL RIGHT TO A JURY TRIAL -- INCOMPATIBILITY OF A RECORD REVIEW AND JURY TRIAL

The Seventh Amendment preserves the right to a jury trial "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars . . ." See, U.S. Const. amend VII. In language that has been repeated numerous times, the Supreme Court has explained that the

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20. Section 9613(j)(1) and (2) of CERCLA, provide, in pertinent part, as follows:

> In any judicial action under this chapter, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record.

See, 42 U.S.C. 9613(j)(1).

> In considering objections raised in any judicial action under this chapter, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.

See, 42 U.S.C. § 9613(j)(2).

phrase "suits at common law" refers to "suits in which legal rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized, and equitable remedies [are] administered." Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry, 494 U.S. 558, 564 (1990).

To determine whether a right to a jury trial applies to a cause of action created by statute, like a claim for natural resource damages under CERCLA, the court must apply the two-pronged test pronounced in Tull v. United States, 481 U.S. 412 (1987). The first prong of the Tull analysis focuses on the nature of the statutory action. Under this prong, the court must compare the statutory action to 18th century actions brought in the courts of England before the merger of law and equity. 481 U.S. at 417. The second prong focuses on the nature of the statutory remedy. Consequently, the court must examine the remedy sought and determine whether it is legal or equitable in nature. 481 U.S. at 417-18.[21] A constitutional right to a jury trial applies only to statutory causes of action that involve rights and remedies of the sort typically enforced in an action at law. Curtis v. Loether, 415 U.S. 189, 194-95 (1974).

Applying the above-described test to CERCLA, the court concludes that an action to recover natural resource damages involves rights and remedies enforced in an action at law, and therefore invokes the Seventh Amendment right to a jury trial.[22]

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21. The Supreme Court has repeatedly stressed that the second inquiry is the "more important" in determining whether a statutory cause of action invokes a constitutional right to a jury trial. See, Chauffers, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 565 (1990).

22. The conclusion reached by this court is consistent with the prevailing view on this issue. See, e.g., In re Acushnet River & New Bedford Harbor: Proceedings re Alleged PCB Pollution, 712 F.Supp. 994 (D.Mass. 1989). As noted by the State, there exists one reported case where a court rejected a jury demand in a CERCLA action despite the presence of a natural resource damage claim. See, United States v. Wade, 653 F.Supp.

a) Nature of Action Prong

Prior to CERCLA, private landowners could institute legal actions for compensation when their property was damaged by a hazardous substance, however, the public had no similar common law mechanism to protect its common resources. See, Fredrick R. Anderson, Natural Resource Damages, Superfund, and the Courts, 16 B.C. Envtl. Aff. L. Rev. 405 406 (1989). In enacting CERCLA, Congress built upon basic common law doctrines, extending liability beyond the traditional rules to include damage to natural resources. See, In re Acushnet River & New Bedford Harbor: Proceedings re Alleged PCB Pollution, 712 F.Supp. 994, 1000 (D.Mass. 1989).[23] CERCLA actions for natural resource damages developed from common law tort actions for property damages. See, State of New York v. Lashins Arcade Co., 881 F.Supp. 101, 104 (S.D.N.Y. 1995)(finding "recovery for loss of natural resources is similar to an action in tort or trespass"). Because property damage claims have always been triable to a jury,[24] the first prong of the Tull analysis dictates that a natural resource damage claim under CERCLA should receive similar treatment.

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11 (E.D.Pa. 1984). In Wade, the natural resource damage claim was limited to the costs previously incurred by the trustee in assessing the injuries to the natural resources, and monies expended on rehabilitating and restoring injured resources. 653 F.Supp. at 13. The court concluded that a jury trial was not appropriate because the recovery of such costs could be characterized as equitable relief. For the reasons described below, this court does not concur with that conclusion.

23. In New Bedford, supra, the court noted that "[t]he common law has long recognized a duty not to injure the property of another." The "legal duty found in CERCLA is only new as a matter of federal law." 712 F.Supp. at 1000. See, also, Duane Woodard & Michael R. Hope, Natural Resource Damage Litigation Under the Comprehensive Environmental Response, Compensation and Liability Act, 14 Harv. Envtl. L. Rev. 189, 190 (arguing that CERCLA builds upon traditional approaches to natural resource damages in the common law).

24. See, Pernell v. Southall Realty Co., 416 U.S. 363, 370 (1974).

b) Nature of Remedy Prong -- Legal or Equitable Relief

In a natural resource damage action, a trustee seeks monetary damages for injury, destruction, or loss of publicly owned or managed natural resources. See, 42 U.S.C. § 9607. Monetary damages are generally regarded as a form of compensatory relief granted by courts of law for which jury trials are available. See,e.g., Wooddell v. International Brotherhood of Electrical Workers Local 71, 502 U.S. 93, 97 (1991). There are only two exceptions to this general rule that monetary damages constitute legal relief. Neither exception is applicable to a natural resource damage action.

An award of money damages may be considered equitable relief if: (1) the relief is restitutionary; or (2) the relief is "incidental to or intertwined with injunctive relief." Chauffeurs, Teamsters & Helpers Local 391 v. Terry, 494 U.S. 558, 570 (1990). The distinction between legal relief and equitable restitutionary relief lies in the means by which the award is meant to accomplish its goal. Legal damages are substitutionary relief providing the plaintiff monetary compensation for an injury that was not originally monetary in form. See, e.g., Motor Vehicle Mars. Ass.'n v. New York, 550 N.E.2d 919, 922 (N.Y. 1990); Franklin v. Mazda Motor Corp., 704 F.Supp. 1325, 1332 (D.Md. 1989). Accordingly, legal damages are measured by the loss sustained by the plaintiff.

In contrast, restitutionary relief is awarded to prevent unjust enrichment of the defendant. See, Crocker v. Piedmont Aviation, Inc., 49 F.3d 735, 747 (D.C. Cir. 1995). A restitutionary award is measured by the unjust gain to the defendant, which equity dictates should be

transferred to the plaintiff.[25] Id.

Applying these rules to a natural resource damage action reveals it is an action for legal relief. In a natural resource damage action, the trustee seeks monetary relief for injuries to publicly owned natural resources. The NRD claim focuses only on the loss suffered by the public, and the claim is quantified solely from the vantage of the trustee. In addition, unlike restitutionary awards of response costs that cover only those costs already incurred,[26] a NRD claim is not limited to monies previously spent. A trustee may recover monies for use in future restoration efforts. See, 42 U.S.C. § 9607(f)(1).[27]

To determine whether a damage claim is "incidental to," or "intertwined with" injunctive relief depends on the remedial structure of the statutory scheme. Crocker v. Piedmont Aviation, Inc., 49 F.3d 735, 748 (D.C. 1995). An award of damages is considered sufficiently removed from injunctive relief if the court's authority to grant damages is based upon a "separate and

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25. Equitable restitution is defined "as that body of law in which (1) substantive liability is based on unjust enrichment, (2) the measure of recovery is based on the defendant's gain instead of the plaintiff's loss, or (3) the court restores to plaintiff, in kind, his lost property or its proceeds." Crocker v. Piedmont, supra, 49 F.3d at 797.

26. See, Stanton Road Associates v. Lohrey Enterprises, 984 F.2d 1015, 1021 (9th Cir. 1993); State ex rel. Howes v. W.R. Peele, Sr. Trust, 876 F.Supp. 733, 740-41 (E.D.N.C. 1995).

27. The argument advanced by the State that natural resource damages are restitutionary focuses on the statutory requirement that trustees must use their damage recoveries for restorative purposes. See, 42 U.S.C. § 9607(f)(1). According to the State, a natural resource damage claim is not truly substitutionary like traditional tort compensation, because the use limitation on monies recovered in a natural resource damage case transforms the monetary recovery into a restitutionary remedy.

The argument of the State may be appropriately rejected because the rules for quantifying natural resource damages are premised upon the trustee's loss rather than the defendant's unjust enrichment, and the defendant is not reimbursing the trustee monies the trustee previously expended.

distinct statutory provision." Id. at 749. A review of CERCLA reveals that an award of natural resource damages is not incidental to, or intertwined with injunctive relief.

Natural resource trustees have no statutory authority to seek injunctive relief. Such relief may only be obtained under CERCLA by federal authorities responding to an imminent and substantial threat to the public health or environment. See, 42 U.S.C. § 9606(a). Furthermore, the statutory scheme of CERCLA provides for a clear division between equitable response costs and natural resource damages, with each remedy prescribed in a separate subsection of CERCLA. See, 42 U.S.C. § 9607(a)(4)(A)-(C).[28]

c) Incompatibility of a Record Review and a Jury Trial

The constitutional right to a jury trial in a natural resource damage action is incompatible

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28. The State contends that even if natural resource damage claims are legal in nature, they are beyond the ambit of the Seventh Amendment because of the operation of the "public rights doctrine".

Under the "public rights doctrine", Congress may assign adjudication of certain cases to non-Article III forums which may, consistent with the Seventh Amendment, refuse to utilize juries in their adjudicatory proceedings. See, e.g., Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42, 53-54 (1989). The State maintains the "public rights doctrine" operates to preclude a jury trial in a natural resource damage case because "Congress has delegated to the President the authority to promulgate regulations for natural resource damage assessments and in so doing has assigned important decision making functions to administrative agencies that take the matter outside the coverage of the Seventh Amendment."

The State's argument may be summarily rejected because Congress did not delegate to public trustees the authority to adjudicate natural resource damage claims. Congress specifically provided that district courts shall have exclusive original jurisdiction over all controversies arising under CERCLA. See, 42 U.S.C. § 9613(b). When a case involving legal issues is heard initially in an Article III court, the Seventh Amendment protects the right to a jury trial. See, Atlas Roofing Co., Inc. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 450 (1977); Pernell v. Southall Realty, 416 U.S. 363, 383 (1974).

with a record review. The record review mandates that courts give substantial deference to the pretrial factual determinations of the administrative agency, whereas the right to a jury trial guaranteed under the Seventh Amendment "reserves the weighing of evidence and the finding of facts exclusively to the jury." Mattison v. Dallas Carrier Corp., 947 F.2d 95, 108 (4th Cir. 1991); See, also, Gronne v. Abrams, 793 F.2d 74, 78 (2nd Cir. 1986). Because a record review infringes upon the jury's role as the ultimate and independent fact finder, it necessarily violates the Seventh Amendment.

Therefore, for the reasons set forth herein,

IT IS HEREBY ORDERED that the State's motion for judicial review of its natural resource damage claim on the administrative record is DENIED.

The Clerk of Court is directed to notify counsel for the respective parties of the entry of this order.

DATED this 28 day of February, 1997.

PAUL G. HATFIELD, SENIOR JUDGE
UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing to all counsel of record appearing in the above-entitled case.

DATED this 3 of MARCH 1997.

LOU ALEKSICH, JR., CLERK

BY _____
Deputy Clerk

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